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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER,
Petitioner,

v.

CARTER COAL COMPANY, *et al.*,
Respondents.

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

STATEMENT

This brief *amici curiae* is filed on behalf of certain commercial producers of bituminous coal in support of the contention of the Petitioner, James Walter Carter, that the "Bituminous Coal Conservation Act of 1935" is unconstitutional.

None of said producers has accepted the "Code" promulgated under said Act. Each of them has instituted a suit in a Federal District Court, attacking the

constitutionality of the Act, and praying an injunction against the collection of the so-called tax levied by Sec. 3 of said Act. In each of these suits a temporary injunction has been awarded against either the collection of the entire 15% tax, or the collection of 90% thereof with the remaining 10% being impounded in the hands of the Clerk of the Court.

For convenient reference, Producers in whose behalf this brief is filed will be referred to herein as Non-Code Producers.

The names of these Non-Code Producers are:

Apex Coal Company, The
Anchor Coal Company
Berwind-White Coal Mining Co., The
Black Band Corporation
Blocton-Cahaba Coal Company
Boone County Coal Corporation
Brookside-Pratt Mining Company
Chariton River Coal Company
Consolidation Coal Company
Corrigan, Emmet, d.b.a. Kansas City Midland Coal & Mining Co.
Cumberland Mountain Coal Co., Inc.
Davidson Mining Company
Delta Coal Mining Company
Dixport Coal Company
Dry Branch Coal Company
Eagle-Cherokee Coal Mng. Co., The
Elk River Coal & Lumber Company
Fentress Coal & Coke Company
Hanna Coal Company of Ohio
Hume-Sinclair Coal Mining Company

Huntsville-Sinclair Mining Company
Island Creek Coal Company
Jackson-Laxton Coal Company
Jefferson Coal Company, The
Leevale Collieries, Inc.
Little Cahaba Coal Company
Mallory Coal Company
Minden Coal Company
Newcastle Coal Company
New River & Pocahontas Consolidated Coal Company
Ocean Coal Company
Phelps Dodge Corporation
Pike-Floyd Coal Company
Pioneer Coal Company, The
Pittsburg & Midway Coal Mining Co.
Pittsburgh Coal Company
Pocahontas Corporation, The
Pocahontas Fuel Company, Inc.
Pond Creek Pocahontas Company
Pulaski Iron Company
Reitz Coal Company
Riverside Coal Company
Stearns Coal & Lumber Company
Stith Coal Company
Sudduth Fuel Company
Tebo Coal Company
Union Collieries Company
Virginia Jellico Coal Company
West Kentucky Coal Company
Windsor Coal Company

Truax-Traer Lignite Coal Company
Cabin Creek Consolidated Coal Company
Blue Valley Coal Corporation
Kentucky Derby Coal Company
Hart Coal Corporation
Reinecke Coal Mining Company
Southland Coal Company
Williams Coal Company
Ruckman Coal Company
New Coal Corporation
Diamond Coal Company
Lick Creek Coal Company
Harmon Creek Coal Company
Low Vein Coal Company
Kington Coal and Coke Company
Meador, Young and Holt Company

The total production of these Non-Code Producers in 1934 was approximately 51,000,000 tons.

Ten of these Producers sell their coal wholly intrastate. See Appendix A.

There is attached hereto as Appendix A, a tabulated statement showing:

(1) The name of each Non-Code Producer.

(2) The state or states, and Code District or Districts, in which its mines are located.

(3) The production of each such Producer for the year 1934.

(4) The District Court in which each Producer's suit is pending.

There are other producers, both Code members and non-Code members, who have suits pending, but who are not parties to this brief.

In each of the suits brought by these Non-Code Producers the bill alleges said Act is wholly unconstitutional and void upon the grounds, among others, that it violates the following provisions of the Constitution of the United States: Article 1, Sec. 8, paragraph 1 (taxing power); Article 1, Sec. 8, paragraph 3 (commerce power); Article 1, Sec. 1 (legislative power); the Tenth Amendment; and the Fifth Amendment.

All of the issues as to the constitutionality of said Act presented in this cause are likewise involved in each of said suits brought by said Non-Code Producers. Therefore they have a vital interest in the determination of such issues by this Court.

Limited Scope of This Brief.

It is not the purpose of this brief to deal with the numerous questions arising under these issues, but rather, supplemental to the brief filed on behalf of the Petitioner, to discuss mainly two propositions: (1) that the Act is wholly void for the reason that it is not confined in operation and effect to transactions in or directly affecting interstate commerce, and (2) that the Act by its arbitrary, unreasonable and capricious terms deprives producers of liberty and property without due process of law in violation of the Fifth Amendment.

Neither will this brief attempt an elaborate discussion of the law, which is fully presented in Petitioner's brief. These Producers are here interested mainly in directing the attention of the Court to certain *facts* supporting these propositions and to some of the *effects* the Act will have if held valid.

It is not necessary to review the provisions of the Act as the brief of Petitioner contains a detailed analysis thereof. Those provisions of the Act which are pertinent to the points discussed herein will be considered as they arise.

POINT I—INTRASTATE COMMERCE

A.

The Act Is Wholly Void in That It Is Not Confined in Operation and Effect to Transactions in or Directly Affecting Interstate Commerce.

The "Bituminous Coal Conservation Act of 1935", so-called, attempts to regulate the mining and marketing of every ton of bituminous coal produced throughout the United States. If such regulation can be sustained, it must be sustained as a valid regulation of interstate commerce. Yet, as appears from the face of the Act and as shown by its legislative history, its draftsmen deliberately extended its provisions to all major activities of the coal industry without making any distinction in its provisions, regulating both production and distribution, between interstate and intrastate activities.

It is stated in the preamble of the Act (Sec. 1) that the considerations named therein require "that the bituminous coal industry be regulated as herein provided,"—meaning the entire bituminous coal industry of the United States. It is further declared that "*all* production of bituminous coal and distribution by the producers thereof * * * render regulation of *all* such production and distribution imperative"

* * * "to the end that control of such production and regulation of the prices realized by the producers thereof are necessary * *;" * "that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting * * * and * * * to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines."[1]

Furthermore, Section 3 of the Act imposes upon the sale or other disposal *"of all bituminous coal produced within the United States,"* an excise tax of a character obviously designed to enforce compliance with the regulatory features of the Act.

The scope and policy of the Act thus outlined are carried out by its subsequent provisions. In no instance is any distinction drawn between interstate and intrastate transactions or activities. As pointed out below, about 42.6% of all bituminous coal produced in the United States is sold wholly intrastate and does not contemplate shipment to buyers in other states. Yet this Act undertakes to regulate the production of this coal and to fix the price at which it must be sold in purely intrastate markets.[2]

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[1] Italics ours unless otherwise noted.

[2] The Court below assumed that a sale of coal f.o.b. mines to a buyer located in another state was a sale in interstate commerce (See F. F. 47). The title passes and the sale to the buyer is complete when the coal is delivered to the carrier. The bulk of all bituminous coal is sold in this fashion (See F. F. 51). Non-Code Producers deny that the agreement of sale or the passing of title is an interstate transaction or is *in* interstate commerce. Obviously, the only interstate feature involved in such a sale is the subsequent transportation. But for the purposes of Point I, the matter is not material, because even if it be assumed that such a sale is *in* interstate commerce, there is an immense volume of coal sold which does not contemplate an interstate movement. But for the purpose of discussion f.o.b. sales to buyers in other states will be treated as interstate.

It is submitted that there is nothing in the Constitution which gives Congress any greater power over the production and distribution of bituminous coal than over the production and distribution of agricultural or other ordinary commodities.

It is too well settled to require argument to support the statement, that the mining of coal is not interstate commerce even when the coal is produced for the purpose of making immediate shipment thereof in interstate commerce. *Heisler* v. *Thomas Coll. Co.* 260 U. S. 245. The labor provisions, affecting matters solely of state concern, are, therefore, clearly outside the scope of the commerce power.

Even if Congress had the power to regulate the prices of coal shipped across state lines (which power is denied), the fact that certain producers of bituminous coal sell a part of their product for subsequent shipment in interstate commerce, does not give to Congress the power to regulate sales in purely intrastate commerce. It is settled that one who engages in interstate commerce does not thereby submit "all his business concerns to the regulating power of Congress." The principle applicable was thus stated by Mr. Justice White in the *First Employers' Liability Cases,* 207 U. S. 463, 502:

> "It remains only to consider the contention which we have previously quoted, that the Act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he

thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

If the attempted regulation by Congress of the purely intrastate, or local, activities of the bituminous coal industry, including the production of such coal and intrastate marketing thereof, be invalid, the entire Act must fall. In spite of the separability clause (Sec. 15)[1] the Act is inseverable in respect of interstate and intrastate commerce. Congress having avoided any distinction in the Act between producers who are engaged in interstate commerce and those who are not, or between those activities of producers which constitute interstate commerce or directly affect it, and those which do not, the Courts will not

[1] "Sec. 15. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

attempt to re-write the Act in order to give it an effect altogether different from that which Congress obviously intended. Though the separability clause contained in Sec. 15 reverses the presumption of inseparability, Congress has made it entirely clear in this Act that no such distinction between interstate and intrastate activities in either the production or distribution of bituminous coal is to be drawn or was intended. *Railroad Retirement Board* v. *Alton R. R.*, 295 U. S. 330, 361-2; *Hill* v. *Wallace*, 259 U. S. 44, 70; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165.

B.

Immense Quantities of Bituminous Coal Are Sold Intrastate. In Each Producing State a Substantial Part of the Coal Sold Intrastate Is Not Competitive with Coal Produced in Other States.

The learned trial court found as a conclusion of law that Congress has the power to regulate the prices of all coal sold in intrastate commerce (C. L. 10(c)). This was based upon a so-called ultimate finding of fact that the intrastate distribution and marketing of coal is so inextricably connected with interstate distribution and marketing thereof as to require the regulation of the former in order effectively to regulate the latter (F. F. 175). This in turn was based upon a finding of certain evidentiary facts (F. F. 47) showing, in effect, that 42.6% of all the coal produced in the United States (in 1929) was sold in intrastate commerce, and that in *some* markets there is competition between locally produced coal and coal produced in other states.

We shall endeavor to show that the ultimate finding of fact is not supported either by this evidentiary finding or by the evidence contained in the record of this cause, and that it is contrary to the facts disclosed by official publications made part of the record in this cause and by public documents of which the Court will take judicial notice, and that the conclusion of law based thereon is unsound.

(a) In the Nation as a whole, more than 42% of all bituminous coal is sold intrastate.

For analysis of the record showing this result, see brief of Petitioner, James Walter Carter, in No. 636, under heading of "Evidence as to the Volume of Coal Sold for Shipment Across State Lines," beginning on page 40. At page 42, it is shown that 42.6% of all bituminous coal moves in intrastate commerce (based upon 1929 results).

Expressed in terms of tonnages, the immense amount of intrastate commerce in coal is apparent:

	Tons (round figures)
Total tonnage for year 1929[1]	536,000,000
Intrastate portion thereof 42.6%	228,000,000
Interstate portion thereof 57.4%[2]	308,000,000

[1] 1929 is the only recent year for which complete distribution figures are available.

[2] In this computation, a sale of coal which contemplates an interstate movement is classed as interstate, even though sold f.o.b. the mines, while a sale which does not contemplate an interstate movement is classed as intrastate. No statistics are available to show the volume of coal contemplating an interstate movement sold f.o.b. mines and the volume sold f.o.b. destination in another state.

(b) In several states a major part of the coal produced is sold intrastate; and in many states the greater part of the coal consumed is produced within the state.

The composite results given above do not provide an accurate representation of the facts in any state producing coal. Actually, the proportions of intrastate shipments to interstate shipments vary most widely among the several producing states. The table below, prepared from Def. Ex. 13 (R. 1018), excludes from intrastate shipments all coal *shipped* (by rail or water) for railroad fuel (whether revenue or non-revenue) but includes, as intrastate shipments, coal delivered direct into locomotive tenders at tiples. (The year is 1929). Some states are omitted.

TABLE SHOWING FOR CERTAIN STATES PERCENTAGE OF PRODUCTION SHIPPED INTRASTATE.

State	%
North Dakota	95.4
Texas	90.1
Iowa	58.6
Washington	57.7
Colorado	56.0
Alabama	53.9
Illinois	43.3
Pennsylvania	
Central Pa.	25.8
Somerset-Meyersdale	18.9
Western Pa.	42.7
Ohio	
Northern Ohio	41.2
Southern Ohio	48.5
Indiana	37.8
Michigan	36.2
West Virginia	
Panhandle	26.0
Northern W. Va.	5.8
New River—Winding Gulf	1.9
Kanawha-Logan-Kenova-Thacker	2.9
Pocahontas	2.7[1]

[1] Carter Coal Company's mines are in this district.

State	%
Kentucky	
Western Ky.	10.9
Northeastern Ky.	5.7
McRoberts	6.5
Hazard	7.9
Harlan-Benham	5.5

Def. Ex. 9 also shows that all the coal produced in Michigan was shipped to Michigan destinations or sold for railroad fuel. 99.9% of the railroad fuel sold by Michigan mines was non-revenue (all but 198 tons—See Plf. Ex. 67, R. 940). Therefore, all of Michigan's production (except 198 tons) was sold wholly intrastate.

Plf. Ex. 67 (R. 940) breaks down the railroad fuel coal shipped by rail or water (not included in above table) into revenue and non-revenue freight. Non-revenue coal is delivered to the carrier serving the mine selling the coal and is treated as intrastate. Revenue coal is delivered to off-line carriers and on it freight is paid to the originating carrier serving the mines. Not all revenue freight moves interstate, but is so counted. The percentages below are for 1929, and are for the same states shown above.

TABLE SHOWING FOR CERTAIN STATES PERCENTAGE OF RAILROAD FUEL COAL SOLD INTRASTATE

	%
North Dakota	94.9
Texas	92.8
Iowa	100.0
Washington	98.0
Colorado	60.2
Alabama	75.3
Illinois	80.2
Pennsylvania	
Central Pa.	59.6
Somerset-Meyersdale	42.7
Connellsville & Westmoreland (included in W. Pa. on preceding table)	85.9
Pittsburgh (included in W. Pa. on preceding table)	51.3
Northern Pa. (included in W. Pa. on preceding table)	74.5
Ohio	
North & Eastern Ohio	50.5
Southern Ohio	72.0
Indiana	83.8
Michigan	99.9
West Virginia	
Panhandle	92.5
Northern W. Va.	33.4
Kanawha	59.4
Logan	29.3
Kenova-Thacker	77.4
New River	53.4
Pocahontas	85.9
Kentucky	
Western Ky.	76.5
Northeastern Ky.	66.1
McRoberts (not given)	
Hazard	62.5
Harlan-Benham	75.8

In addition, the percentage for the following states was 100 each: Montana, New Mexico, and Washington.

For the country as a whole, about 129,000,000 tons were sold for railroad fuel in 1929 (not including locomotive coal taken into tenders at tipples.) (See Plf. Ex. 67, 124,159,938 sold to Class I roads plus about 4,400,000 to other roads). Of this total 69.1% was non-revenue, or over 88,000,000 tons.[1]

Excluding locomotive coal, coal used at mines, coked at mines and local sales by truck and wagons,[2] and railroad fuel coal (shipped by rail or water), the following table prepared from Defs. Ex. 9 (R. 1014) shows the large percentage of coal consumed in certain states which was produced in the state of consumption.

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[1] Of the railroad fuel coal, a substantial part is captive, i.e., the mines are owned by the railroad consuming the coal. In House Hearings, p. 470, Dr. C. S. Duncan, economist representing the Association of American Railroads stated that in 1924, Class I carriers owned 135 mines and produced 27,000,000 tons of coal. Captive coal will be discussed in more detail hereinafter.

The citation "House Hearings" refers to "Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, Seventy-Fourth Congress, First Session, on H. R. 8479."

The citation "Senate Hearings" refers to "Hearings before a Subcommittee of the Committee on Interstate Commerce, United States Senate, Seventy-Fourth Congress, First Session, on S. 1417."

[2] Of a total production for 1929 of 536,604,788 tons, 9,128,607 tons were coked at the mines and 23,252,645 tons were represented by local sales by truck and wagon to mine employees and others and locomotive coal delivered from tipples.

State	Tons of coal shipped to destinations in State from all fields, within & without State. (Consumption) (1)	Tons of which produced in State of consumption (2)	% (2) is of (1)
Alabama	9,419,956	9,118,794	97
Colorado	4,663,683	4,618,169	99
Utah	2,179,944	2,139,022	97
Wyoming	481,636	399,469	83
Washington	1,716,091	1,202,141	70
Pennsylvania	45,187,477	38,585,891	85
Illinois (outside Chicago Dist.)	19,234,810	14,027,684	73
Indiana (outside Chicago Dist.)	14,632,580	5,680,664	39
New Mexico	468,131	407,216	87

(c) Sales from Docks, Storage Piles and Retail Yards Are Partly Intrastate.

All coal which is shipped across state lines to docks, storage piles, and retail yards is counted in Government data as interstate. However, much of such coal is not sold interstate.

For example, a substantial market for the coal produced in the Appalachian region is in the Lake Cargo trade, which consists of coal shipped to ports on Lake Erie, and from them transported by boats to docks situated at various points on the Great Lakes, chiefly in the Northwest on Lakes Michigan and Superior. This course of trade is comprehensively described in the Report of the United States Coal Commission (1925), in Part II, beginning at page 816.

The Commission's study is quoted in part:

"The great service of the docks lies in storing the winter's supply. Their storage facilities are equivalent to 50% of the territory's winter consumption. The dock operators store coal during the summer months in sufficient quantities to supply the demand during the months when additional supplies cannot be obtained because of the closing of the Great Lakes to navigation." (p. 817)

"Coal can be handled over the Lakes only during the period of approximately seven months that they are open to navigation. A season's carrying capacity is dependent upon weather conditions, stage of water, and speed in loading and unloading, the last mentioned being the most important." (p. 818)

"The dock companies ship in carload lots to retail dealers, industrial consumers, and public utilities, and supply large quantities of railroad fuel. They sell to a few jobbers at inland points. In the port cities, and Minneapolis and St. Paul, they have their own retail facilities and sell direct to householders." (p. 818)

"Most of the dock companies are financially affiliated with Eastern companies producing bituminous coal. Others are affiliated with producers of anthracite, and still others are independent." (p. 818)

"Most of the dock companies not only sell to retailers, but also operate retail yards in some of the larger cities in the Northwest, including not only the cities where the docks are located, but Minneapolis and St. Paul as well." (p. 820)

There are three general courses of doing business. In some cases the producing companies own docks

directly or indirectly, and handle their own coal. In other cases independent dock companies buy and resell for their own account. In still other cases, an independent dock owner will act as an agent for the producer, handling the coal on consignment and selling on commission.

Some of the Producers filing this brief ship coal to the Lake docks, handling it in each of the three manners above mentioned.

Some producers, including some Non-Code Producers, likewise own river and coastwise transportation facilities, and docks and storage yards on the rivers and along the Eastern seaboard at points of consumption. Coal is shipped to such docks and storage yards, either in part or in whole over their own transportation facilities, and stored for future sale. Coal is likewise handled over such docks and yards on consignment for producers. It is a matter of common knowledge that most of the coal sold from such docks and yards is sold to consumers in the states where the docks and yards are located.

Many producing companies own, either directly or indirectly, retail yards in different market centers, and ship coal to such yards in off season, and store the same awaiting sale. Some of the Non-Code Producers own such yards.

It is apparent that coal shipped by producers to their docks, storage yards, and to retail yards, is sold for the first time from such docks and yards. And when delivered on such docks and yards, such coal becomes a part of the mass of the goods of the State in which the docks or yards are located and is taxed as such. There has been interstate transportation of

such coal but not interstate sale. Therefore, the sale of such coal from such storage yards and docks and retail yards for delivery to a purchaser located in the same state, is an intrastate transaction beyond the control of the Federal Government. *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495.

(d) There are many local markets in the several coal producing States wherein there is no competition from coal mined in other States.[1]

Were it not for the conclusion and findings of the Court below, above mentioned, proof upon this point would be proof of the obvious—a needless task.

In Alabama, all but 3%, or about 300,000 tons, of the total shipments to Alabama destinations from all states were produced in Alabama. The 300,000 tons came from West Virginia, Southwestern Virginia, Kentucky, Tennessee, and Georgia. (Def. Ex. 9, R. 1014). The coal fields in these states all lie north of Alabama. The Alabama fields are in the northern central part of the state. (See IV, Report, U. S. Coal Commission, p. 2036, Map 1.) The coal from the

[1] In addition to denying the power of Congress to fix the prices of articles because they are sold in interstate commerce, we deny that the existence of competition between intrastate and interstate sales confers upon Congress the right to regulate the prices of intrastate sales. It is submitted that under the principles enunciated in *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, Federal price regulation of intrastate sales of a commodity is wholly beyond the power of Congress under the Commerce Clause. The prices of intrastate sales may conceivably affect the prices of interstate sales, but the effect is, as a matter of law, indirect and not direct. But even if it be assumed that where, in fact, intrastate sales do compete with interstate sales, the effect on interstate sales is, in law, direct, and if it be further assumed that Congress may regulate the prices of interstate sales, yet there is a large volume of coal sold intrastate which is not competitive with interstate sales, and which is, under any interpretation of the word *direct*, beyond the reach of Congress. It is our purpose under this heading to call to the Court's attention the large volume of intrastate sales which do not, in fact, compete with interstate sales.

The questions decided in the *Minnesota Rate Cases*, 230 U. S. 352, and the *Shreveport Case*, 234 U. S. 342, involved wholly different considerations, and are not applicable here.

other states must obviously be destined for the territory in Alabama north of the producing fields of Alabama. Clearly, because of the freight rate disadvantage against Tennessee, Kentucky, Virginia and West Virginia, coal from those states cannot penetrate into many portions of the Southern part of Alabama.

Into Colorado, only about 45,000 tons were shipped from other states, or less than 1% of all shipments to Colorado points. This coal came from Kansas and Missouri fields (120 tons), Wyoming (16,164 tons), Utah (6,018) tons, and New Mexico (23,212 tons). (Def. Ex. 9.) A map showing the location of the Colorado fields (See IV, Report U. S. Coal Commission, p. 2038, Map 3) shows that the coal originating in other states could not move far across the Colorado boundaries, and that for the great part of the State, and particularly the central part, the factor of distance with its high freight charges eliminates competition from other states.

New Mexico imported about 61,000 tons from nearby states, from Colorado (59,581 tons), Oklahoma (1181 tons), Arkansas (153 tons). (Def. Ex. 9.) Said map indicates why so little coal was imported. The mining districts are scattered through the state. The factor of distance rules out interstate competition in the greater portion thereof.

As to the State of Washington, said Map No. 3 shows the Washington fields to be in the western part of the State. Such coal as moved into Washington from other states (Montana 38,019 tons, Wyoming 163,481 tons, Utah 311,757 tons, Colorado 693 tons) could not have penetrated far into the state and must have stopped in the eastern part thereof.

The same map shows that the mines in central Wyoming can have no interstate competition at points in the central part of Wyoming, where the producing fields are located.

It is obvious from said maps that as to local wagon and truck sales made at all mines (except those near producing fields in other states), there can be no interstate competition. A producer located in Central Pennsylvania will have no competition from West Virginia, Ohio, or Maryland mines in selling coal to his mine employees for domestic fuel. In fact, all sales to employees are free from any interstate competition—they are, in most cases, because of lower prices accorded employees and short hauls, free of intrastate competition. Local sales to individuals and business enterprises in the mining regions are not ordinarily competitive with coal produced in other states.

PLANTS AT OR NEAR MINES

It is a matter of common knowledge that many large consumers of coal have located their plants close to the mines, and draw their supplies from the nearby mines. In such cases the coal sold to such industries by the nearby mines does not compete with coal produced in other states.

Typical instances of utility electric plants situated at or near the mines are given in a pamphlet by Dr. William Harvey Young, of the United States Bureau of Mines, entitled: "Sources of Coal and Types of Stokers and Burners Used by Electric Public Utility Power Plants," published by the Brookings Institution, Pamphlet Series, Vol. 2, No. 2, Dec. 31, 1930.

At page 14 *et seq.* of this pamphlet it is stated:

"Where coal mines and ample condensing water are found together not far from the center of the anticipated load, the power company may build its generating station directly at the mine. This fortunate combination is not often met with, however, and in the United States the number of mine-mouth power stations is small. The most conspicuous examples are the Springdale station on the Allegheny River, owned by the West Penn Power Company, and the Windsor station, on the Ohio in the West Virginia Panhandle district owned jointly by the West Penn and the American Gas and Electric Companies. At these mines the transportation arrangements from working face to boiler room are especially interesting. The coal is transferred from the mine tipple direct to the power plant by belt conveyor.

"Other mine-mouth plants of significance are the Wabash station No. 1 of the Indiana Electric Corporation near Terre Haute, Indiana; the Rivesville station of the West Penn system on the Monongahela River in West Virginia; the Lothair plant of the Kentucky and West Virginia Power Company on the Kentucky River in Perry County, Kentucky; and the Thomas, West Virginia, plant of the Davis Coal and Coke Company. The total quantity of coal consumed by mine-mouth stations in 1928 was 1,788,334 tons, or 4 per cent of the total for all plants.

"Somewhat more numerous are the stations located not directly at the mines but in the near vicinity and receiving their coal not in mine cars but by a short rail or water haul. The plants of this group consumed 4,000,000 tons of coal in 1928, or 10 per cent of the grand total. They are found most commonly in the mining fields of

Pennsylvania, West Virginia, Kentucky, Ohio, and Illinois. A few of the outstanding examples are the Colfax plant of the Duquesne Light Company near Pittsburgh; the Cabin Creek Junction plant of the Appalachian Power Company near Charleston, West Virginia; the Philo plant of the Ohio Power Company, receiving most of its coal by way of the Muskingum River; and the Springfield plant of the Illinois Power Company. Several plants located in the vicinity of the anthracite region or on the Susquehanna River have easy access to coal supplies. A few plants using dredged anthracite are located on the rivers near the dredging operations and are in a sense mine-mouth plants. In 1928, 231,466 tons were delivered from mines to nearby plants by truck.

"The construction of power plants in the mining districts has an obvious effect on coal distribution. A station built directly at a given mine is designed to use the output of that mine. A station located centrally in the district, though able to draw on the several mines of the district, is seldom likely to purchase from outside. In time of strike or other emergency, however, either type of station may be an open market to mines outside the district."

There are some interesting tables contained in the above pamphlet, which include plants not at or near mines. On page 73, it is shown that all power plants located in Pennsylvania received practically all of their coal from Pennsylvania mines; on page 77, that all power plants located in West Virginia received practically all of their coal from West Virginia mines; and that all power plants in Kentucky received practically all of their coal from mines in Kentucky. On pages 78 and 79, it is shown that

all power plants located in Alabama, New Mexico, Utah, Montana and Washington received all of their coal from mines located in the same state; and that all power plants in Colorado received all but a minor fraction of their coal from mines located in Colorado. The figures given are for the year 1928.

It appears to be obvious, as Dr. Young says, that producers whose mines are located in other states cannot hope to sell coal to power stations located at mine mouths or in the central part of a producing field. It is obvious that there are many other consumers of coal, both large and small, located at and near the mining fields, who buy their coal locally and not from producers located in other states, and that sales to such consumers are, because of the vast difference in transportation charges, not competitive with sales of coal produced in other states.

SALES BY WAGON MINES AND COUNTRY COAL BANKS.

The statistics prepared by the United States Bureau of Mines do not include mines producing less than 1,000 tons per year. (See Def. Ex. 8, R. 1013). Accordingly, when it is stated, upon the basis of figures prepared by the Bureau of Mines, that there are a certain number of mines within the United States, it must be remembered that such mines include only those producing 1,000 tons or more per year. In *Coal In 1926,* published by the U. S. Bureau of Mines, at page 438, it is stated:

> "Commercial mines and wagon mines.—A complete count of the *thousands* of wagon mines and country coal banks from which bituminous coal is dug in the United States could be made only by sending agents up every creek and along every

hillside in the coal-bearing regions. . . . The Federal Census Bureau set this limit at mines producing about 1,000 tons a year for the last decennial census of mines and quarries taken in 1920. . . ."

"Mere size of output is not a criterion, for some wagon mines ship rather large quantities of coal. Absence of a railroad switch is not a criterion, for this would exclude from the commercial class some large mines that ship by river or truck, *or that deliver their product to associated industries at the mouth of the mine.* . . .

"These smaller properties sometimes ship by rail, *but oftener serve a local market by wagon or truck or supply a local manufacturing plant near the tipple.* There are many hundreds of such small operations that continue to contribute to the supply of coal year after year, and the Bureau endeavors to include them in its list of commercial producers."

It is a matter of common knowledge that local sales by truck and wagon are substantial in amount. (See Def. Ex. 8, R. 1013.) In 1933, 15,462,739 tons were represented by truck or wagon commercial sales, and 7,589,672 tons, were represented by "other sales to local trade, used by employees, or taken by locomotives at tipple." In addition, 1,440,736 tons were coked at the mines, and 2,857,721 tons were used at the mines for heat and power.

On page 440 of *Coal in 1926* it is stated that the data do not include operations which are commonly known as country coal banks where a few men dig coal for their own use and for sale in the neighborhood at points remote from railroads, that the number of such operations runs into the thousands, and

that such sales do not involve the use of railroad cars and do not compete with the operation of commercial mines.

And yet the Act undertakes to regulate the prices at which the coal from such wagon mines and country coal banks, however small and however local, can be sold.

CAPTIVE COAL

"Captive" coal represents a substantial portion of the total production of coal. For instance, in the year 1926, captive mines produced over 130,000,000 tons out of a total of over 573,000,000 tons, or approximately 22.7% of the whole (See *Coal in 1926*, p. 475, Table 27). It is a matter of common knowledge that a large part of the captive tonnage is consumed in the state in which produced, the percentage varying with the different states. (See House Hearings, pp. 309-10). About 65% of the captive production of U. S. Steel Corporation is consumed in the state of production. (Senate Hearings, p. 409.) Since captive coal does not compete with commercial coal, being produced only as required by the owner (House Hearings, pp. 306, 309, 310, 469) and not for sale in the open markets, it would appear obvious that captive coal, certainly when consumed in the state of production, is clearly beyond the power of Congress to regulate with respect either to production or prices.

It has not been the purpose, in reviewing instances of local or intrastate sales of coal, to describe in detail all instances of such sales. The purpose is to call to the attention of the Court the fact that there is a

large volume of bituminous coal sold or disposed of in purely intrastate commerce, which not only is not *in* interstate commerce but does not directly affect interstate commerce.

Yet in spite of the facts above pointed out, the lower Court found, in paragraph 10(c) of its Conclusions of Law (R. 213) as follows:

> "Congress has the power to regulate the prices of coal sold in intrastate commerce, since such prices are inextricably intermingled with interstate prices, and since such action is necessary to prevent discrimination against interstate commerce and to make regulation of the prices of coal sold in interstate commerce effective."

This Conclusion of Law was based upon Finding of Ultimate Fact 175, reading as follows:

> "The distribution and marketing of bituminous coal within the United States is predominantly interstate in character, and the interstate distribution and sale, and the intrastate distribution and sale of such coal are so intimately and inextricably connected, related, and interwoven that the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate commerce, unless transactions of intrastate distribution and sale be regulated."

This Finding of Ultimate Fact is in turn based upon Findings of Evidentiary Fact 47.

Finding 47 reads as follows:

> "47. In 1929 (the only year for which complete figures as to distribution are available) 23.8% of all bituminous coal produced in the United

States was sold to railroads subject to the jurisdiction of the Interstate Commerce Commission, for fuel. 69.1% of such railroad fuel was delivered directly to the purchasing railroad at the mouth of the mine, no freight being paid thereon. The evidence does not show the proportion of said coal which was used by the railroads in interstate operations as distinct from local operations. 50% (referring to the total production) was shipped to consumers (other than railroads) in states other than the state of production or to consumers in foreign countries; and 26.2% was shipped to consumers (other than railroads) within the state of production (Def. Ex. 13, 14, Plf. Ex. 67; Tr. 478, 1293; 1542-3). Bituminous coal mined in every state competes in the consuming markets with bituminous coal mined in other states. Bituminous coal in substantial quantity is received in interstate commerce from other states by every state which produces bituminous coal. (Def. Ex. 9, 10.) In every state producing bituminous coal intrastate shipments from the mines of that state meet active competition from interstate shipments. (Tr. 1947). (Def. Ex. 9, 10, 15, 16). The destination to which the coal produced in any one state is shipped and the determination of the direction in which it is shipped are influenced by variations in the price at which it may be sold. A change of a few cents a ton in the price at which coal is offered for sale may materially affect the decisions of consumers as to whether or not to buy coal from a particular producer, from a particular mine, or from a particular producing area." (Tr. 301)

It is to be noted that the above finding is general and applies to states as a whole. The Court did not find and could not find that as to all consumers in

each state producing coal or at all points where coal is consumed in each state the sale of coal produced within the state competes within the state with the sale of coal produced in another state, nor is there any finding showing *the extent* either as to the number of consumers or points of consumption to which this general finding applies. At most the finding goes no further than to say that as to some consumers and at some points of consumption there is competition between coal produced within the state of consumption and coal produced in other states. Furthermore, such finding ignores that large volume of coal produced and sold in each state which is not competitive with coal shipped from other states as heretofore pointed out. Therefore, these Producers submit that the finding of ultimate fact 175 is contrary to established and recognized facts above pointed out and that the conclusion of law based thereon is unjustified.

To summarize, it is submitted that the only finding of fact which the evidence supports is that in *some* localities in producing states *some* coal used by *some* consumers which is produced in such states competes with *some* coal which is shipped in from other states. As pointed out above, there is a large amount of coal consumed in the same state in which it is produced that does not come into competition with coal from other states. The sale or disposal of such coal cannot directly affect interstate commerce in the coal produced in other states. The premise upon which the Government's argument is founded is not supported by the evidence. It is not true in point of fact. The Act constitutes an effort on the part of Congress to regulate an immense volume of purely intrastate

business and commerce and is beyond the power of Congress even under the theory of the Government.

POINT II—FIFTH AMENDMENT

The Act Does Not Seek Legitimate Ends and by Its Arbitrary, Unreasonable and Capricious Terms, Deprives Producers of Bituminous Coal of Liberty and Property without Due Process of Law.

Even if the provisions of the Act were or could be confined in their application to transactions in or directly affecting interstate commerce (which, as we have seen, is not the case), and were within the power of Congress (which they are not), they would still violate the Due Process Clause of the Fifth Amendment to the Constitution because (1) the ends sought to be reached are not legitimate and (2) the means prescribed are unreasonable, arbitrary, capricious, and confiscatory. It is well settled that the commerce power of Congress is subject to the limitations of the Fifth Amendment. (*Railroad Retirement Board* v. *Alton Railroad Company,* 295 U. S. 330.)

The dual test of (1) the legitimacy of the end and (2) the reasonableness of the means has always been applicable whenever the protection of the Fifth Amendment has been invoked. This test of "due process" has been described in varying words:[1] Thus in *Chicago, Burlington & Quincy Railway* v. *Drain-*

[1] The most recent expressions are in *Railroad Retirement Board* v. *Alton R. R. Co.,* 295 U. S. 330, 347; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 311; *Nebbia* v. *New York,* 291 U. S. 502, 523, 539.

age Commissioners, 200 U. S. 561, at 593, the Court said:

> "If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

A. THE ACT DOES NOT SEEK ENDS WITHIN THE COMPETENCY OF CONGRESS.

While the Act is called the "Bituminous Coal Conservation Act of 1935", no direct conservation of coal by Federal acquisition of coal lands is attempted by the Act as passed. In this regard, the name is misleading for the admitted end at which the Act is aimed is not conservation but, on the contrary, the control of production, distribution and labor relations in the bituminous coal industry.

Thus, although the mining and distribution of bituminous coal are permitted to remain in the private hands of individuals and state corporations, Congress seeks by regulation to prescribe directly the price at which bituminous coal may be sold, not only at the mine but in the various market areas, the profit which may be obtained for it and thus the persons who may continue to mine it. Moreover, Congress seeks to regulate the labor relations in a productive industry purely local in character. All these ends, it is submitted, are beyond the reach of the Federal arm. Indeed, many of them, though essentially lo-

cal, are beyond the scope of the broad police powers which have been reserved to the individual states. This Court has so held in a line of cases which includes *Wolff Packing Co.* v. *Kansas Court of Industrial Relations,* 262 U. S. 522, 539; *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Adkins* v. *Children's Hospital,* 261 U. S. 525.

Even if the States had such power, however, it is submitted that the exercise of a like power by Congress would be "demonstrably irrelevant to the policy the legislature is free to adopt" and hence a violation of the Due Process Clause of the Fifth Amendment. (Compare *Nebbia* v. *New York, supra,* and *Baldwin* v. *Seelig,* 294 U. S. 511). For, whether or not interstate commerce is directly involved, it has never been supposed that Congress had the power to fix the price at which ordinary commercial commodities or services may be sold in open competition with similar and competing commodities or services. See *Hammer* v. *Dagenhart,* 247 U. S. 251; *Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 434; *Butler* v. *U. S.* (decided Jan. 6, 1936).

As the lack of power of Congress to fix prices at which bituminous coal may be sold is discussed in the brief of the Petitioner, we shall not attempt further argument or citation of authorities upon this proposition.

B. THE MEANS EMPLOYED ARE ARBITRARY, UNREASONABLE, CAPRICIOUS AND CONFISCATORY.

It is not intended here to discuss the labor provisions of the Act. They are treated *in extenso* in Petitioner's brief. These Producers believe that it

will be more useful to analyze and consider some of the questions of due process which arise under the price fixing provisions of the Act, and certain other sections of the Act not contained in the Code.

The ground work for consideration of the questions in connection with fixing of prices must be laid in a statement of the method by which it is proposed that minimum prices be fixed.

(a) The price fixing provisions analyzed. (Section 4, Part II)

The country is divided, by the Act, into 23 producing Districts. (See Sec. 4 I (a) and Annex to the Act.) These Districts, in general, follow the districts which were set up under the N. R. A. Coal Code.[1] They are composed of many smaller local producing districts. (House Hearings, p. 427).

In addition to Districts, the Act creates nine Minimum Price Areas (See Sec. 4 II (a)). Area No. 1 is composed of the first 12 and part of the 13th Districts described in the Annex. The territorial area included therein embraces all the coal producing districts located East of the Mississippi River, save only Alabama, and includes the State of Iowa, West of the river. From Minimum Price Area No. 1 is produced approximately 89% (in 1934) of all the bituminous coal mined in the

[1] The Districts created by the Act vary widely in size and tonnage. The largest is Southern No. 2 with 20% of the national tonnage in 1934, *i.e.*, 72,529,000 tons—the smallest is No. 18 with .16% or 568,000 tons. (See Plf. Ex. 19, R. 816.)

The Commission is given the *unrestrained* power to alter the composition of the Districts and may divide or consolidate them (Section 4, Part I(a)). The exercise of this power will have an effect both on the wage structure and the price structure since the wages are to be fixed by district agreements under Part III of Section 4 and the prices are to be fixed in exceptional cases on a basis of the weighted average cost of the District. (Section 4, Part II(b). The arbitrary character of this power calls for no extended comment.

United States (See Plf. Ex. 19, R. 816). Four of the Minimum Price Areas produce less than 1% of the annual production (Nos. 3, 7, 8 & 9), and the largest such area outside No. 1 is No. 2 with 2.96%. There is no precedent in the industry in the way of trade associations,[1] industrial organizations, wage negotiations,[2] freight rate relationships,[3] or in any other respect for combining Area No. 1 into a single unit for any purpose (House Hearings, p. 428). The creation of this huge Minimum Price Area is in and of itself arbitrary and unreasonable. Cf. *Bordens Farms Products Co.* v. *Ten Eyck,* (Feb. 10, 1936).

The Act provides for a District Board for each District of from 3 to 17 members. (Sec. 4 I(a)). All but one of the members of each Board are elected by the Code-member producers within the District.[4] One member is elected by the labor organization having a majority of members within the District. The number of members of the District Board may vary with the District.

Code member producers are required to report all spot orders to the District Board, and to file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, costs, sale, and distribution of their coal, as the Commission may authorize or require (Sec. 4 II(a)).

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[1] The operators' associations in the Appalachian region are listed as parties to the 1935 Appalachian Wage Agreement, Def. Ex. 21, R. 1029. Note that they represent the local producing districts, which are smaller than the districts created under the Act.

[2] In the Appalachian Wage Agreement for 1935 (R. 1029), Illinois, Indiana, and Iowa are omitted.

[3] For a few instances of freight rate relationships, see Plf. Exs. 54, 55 and 56 (R. 871-875).

[4] Non-Code Producers were not permitted to participate in District Board elections. (See R. 808.)

Each District Board is directed to determine, for the year 1934, the weighted average cost of production of the ascertainable tonnage produced in the District, including the elements of cost described in subsection (a) of Part II of Section 4. The District Board is directed to adjust the average cost so determined to give effect to any changes in wage rates, hours of employment or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1934.[1]

Having made such determination, the District Boards report the weighted average cost so determined to the National Bituminous Coal Commission (created by Section 2 of the Act), together with the computations upon which the determinations are based, and then the Commission, on the basis of the matters so reported, determines the weighted average cost of production for each Minimum Price Area, which figure is reported to each District Board within the Price Area. The figures so determined remain unchanged until a District Board can furnish satisfactory proof to the Commission that the weighted average cost of the Minimum Price Area has increased or decreased more than two cents per ton. Thus, if the weighted average cost in a particular District in

[1] It is assumed that such determination will be made from the reports and other information filed by Code members with the District Boards, and also from such information as the Commission may exact from non-member producers under the provisions of Section 10, information which, under the provisions of the Code (Sec. 4 II (a)) and of Sec. 10, is required to be kept confidential. The Commission has required the filing of such information.

(A series of special Orders directed to each District Board was entered Dec. 20, 1935, requiring detailed information as to costs and realization from each producer, for period Jan. 1, 1934, to Sept. 1, 1935, on Cost Forms 1 and 2 prepared by the Commission.)

a Minimum Price Area should decline five cents per ton, and the weighted average cost in another District within the same Area should increase five cents per ton, and substantially equivalent tonnages were involved in each District, there would be no change in the weighted average cost of the Minimum Price Area.

The determination of the weighted average cost of the Minimum Price Area having been made by the Commission, it then becomes the duty of each District Board to establish minimum prices f. o. b. the mines on the basis thereof.[1] These prices are to be for all "kinds, qualities and sizes of coal produced in said district, with full authority (in the District Board) in establishing such minimum prices to make such classifications of coals and price variations *as to mines and consuming market areas as it may deem necessary and proper.*" (Consuming market area is not synonymous with Minimum Price Area, or with District. The consuming market areas are not defined in the Act, and, presumably, will be defined by the several District Boards and by the Commission.)

The Act then provides (Sec. 4 II (a)):

> "In order to sustain the stablization of wages, working conditions and maximum hours of labor, said prices shall be established so as to yield a return per net ton *for each district* in a minimum price area. . . . equal, as nearly as may

[1] This formula of weighted average cost reverses the usual results of the law of supply and demand and requires higher prices when demand is low and lower prices when demand is active. This is because as production increases costs decline and, vice versa, as production decreases costs rise. A period of depression with declining production would cause a spiraling increase in minimum prices. The injurious effect is obvious. A formula of such nature is unreasonable, arbitrary and capricious.

be, to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such *minimum price area.*"

Stated otherwise, the minimum prices on all the grades and sizes of coal produced in each District must yield a price for the total tonnage produced in the District equal at least to the total cost of production, *computed not on the basis of the actual cost in the District, but by multiplying the total production of the District by the average cost of the Minimum Price Area in which the District is located.* In other words, the general level of the minimum prices in each *District* is determined by the weighted average cost of production of all the mines in the *Minimum Price Area* in which the *District* is located.

The Act directs that:

> "The minimum prices so established shall reflect as nearly as possible the *relative market value* of the various kinds, qualities and sizes of coal, shall be *just and equitable* as between producers within the district, and shall have *due regard* to the interest of the consuming public." (Sec. 4 II(a)).

Also it is provided:

> "That all minimum prices established for any kind, quality or size of coal for shipment into any consuming market area shall be *just and equitable* as between producers within the district; and provided further that no minimum

price shall be established that permits *dumping.*"[1]

Having established such minimum prices, each District Board then furnishes a schedule thereof, together with the data upon which they are computed and the factors considered in determining the price relationship, to the Commission. The Commission is authorized to approve, disapprove or modify the same to conform to the requirements of subsection (a) of Part II, and such approval, disapproval or modification is made binding upon all Code members within the District, subject to such modifications as may result from the coordination provided in subsection (b) of Part II.

In addition to establishing minimum prices, each District Board is required (Sec. 4 II(a)) to establish "reasonable rules and regulations incidental to *the sale and distribution of coal by code members within the district.*" These rules and regulations must not be inconsistent with the requirements of subsection (a), and must conform to the "standards of fair competition" contained in subsection (i) of Part II. The Commission is authorized to approve, disapprove or modify such rules and regulations, and its action is made binding upon all Code members within the District.

[1] Dumping is not defined in the Act. It does not contemplate distress coal, *i.e.*, coal shipped without an order, because such shipments are prohibited by subsection (i), Part II, Sec. 4. It cannot prohibit sales below the producer's average cost of production, *i.e.*, cost per ton on mine run basis, because it is contemplated that minimum prices, being based upon weighted average cost of many producers, will be below the cost of the high cost producers. It cannot prohibit the making of different mine prices for different consuming market areas, because such different prices are specifically permitted.

The District Boards are directed (Sec. 4 II(b)) to coordinate in common consuming market areas the minimum prices and the rules and regulations established by them under subsection (a). Such coordination shall be "upon a *fair competitive basis*" and "among other factors, *but without limitation,* shall take into account the various kinds, qualities and sizes of coal, and *transportation charges* upon coal."

All such minimum prices established for shipment into any consuming market area are required to be "*just and equitable* and *not unduly prejudicial or preferential* as between and among districts, and shall reflect, as nearly as possible, the *relative market values* at points of delivery in each common consuming market area, of the various kinds, qualities and sizes of coal produced in the various districts."

The purpose of such coordination of delivered prices is: "to the *end* of affording the producers in the several districts *substantially the same opportunity* to dispose of their coals upon a competitive basis as has *heretofore* existed."

Certain other limitations apply in establishing coordinated delivered prices. One of them is that coordination shall not reduce the return per net ton upon the entire tonnage of any District below the weighted average of the total costs per net ton of the tonnage of such Minimum Price Area. Another limitation is that "no minimum price shall be established which permits *dumping.*"

If the Commission finds that fixing minimum prices in any District in the manner set out above operates prejudicially to any District with respect

to its fair opportunity to market the coal produced therein, and that the prejudice cannot be removed through coordination of prices, as provided in subsection (b), then the Commission is authorized to establish "a *different* basis for determining prices in such district." The purpose of establishing a different basis is "to the end that *fair and competitive* prices shall prevail in the marketing of the coal produced in such district." However, it is provided "that the minimum prices so established as to any such district shall yield a return per net ton not less than the weighted average of the total costs per net ton of the tonnage of such district."

It is apparent that the District Boards, in fixing minimum prices (which must be for future application), must assume that certain definite tonnages of each grade and size of coal will be produced, because the prices for the different grades and sizes vary. The weighted average of costs is based upon *past* facts—the realization depends upon future events, viz., the quantity which can be sold. The Board must *guess* at the volume of future sale of each size, of each grade, of each producer.

It is further provided in Part II that, subject to certain exceptions, no coal shall be sold below the minimum price approved or established by the Commission (Subsec. (e)).

Subsection (g) of Part II provides:

> "The price provisions of this Act shall not be evaded or violated by or through the use of docks or other storage facilities, or transportation facilities, or by or through the use of subsidiaries, affiliated sales or transportation com-

panies, or other intermediaries or instrumentalities, or by or through the absorption, directly or indirectly, of any transportation or incidental charge, of whatsoever kind or character, or any part thereof. The Commission is hereby authorized, after investigation and hearing, and upon notice to the interested parties, to make and issue rules and regulations to make this subsection effective."

In other words, the Commission is authorized not only to fix minimum prices, but also to fix the charges for transportation, storage and sales, in order to avoid price absorption through the lowering of such charges below those applying to producers lacking such facilities. The granting of authority to the Commission over such distribution facilities of producers is an effort to deprive those who have made large capital investments in such facilities of the advantages derivable therefrom in competition with others not having such facilities. This furnishes a striking example of the extent to which it is necessary to go once centralized control is undertaken.

The Commission is likewise authorized to fix maximum prices (Section 4, Part II (c)). These prices must be at a uniform increase above the minimum prices subject to the proviso that they shall yield cost and a reasonable profit to each producer. Maximum prices are tied in to minimum prices and are conditioned upon the previous existence of minimum prices. Without minimum prices, therefore, there can be no maximum prices. If the minimum prices are invalid, the maximum prices certainly will be.

We have called attention to the "standards" by which the District Boards and the Commission are

supposed to be guided in the establishment and coordination of prices. With respect to many actions no standards of any kind are prescribed. Particularly is this true of classification. But where attempted, such standards as "just and equitable," "due regard," "fair competitive basis," "not unduly prejudicial or preferential," and "substantially the same opportunity . . . upon a competitive basis as has heretofore existed," are illusory. They amount to nothing more than vague statements of policies and aims. They operate as no restraint either upon the District Board or upon the Commission. They are of the type condemned by this Court in the *Schechter* case. The result is that the District Boards and the Commission are authorized to fix such prices at the mines and in various consuming markets as in their uncontrolled discretion they see fit.

(b) The primary basis for fixing minimum prices—the weighted average of the total costs in the Minimum Price Area (or the District)—is arbitrary, unreasonable and confiscatory.

An average or weighted average of total costs is an artificial figure and does not represent the actual costs of any producer, unless it be by accident. It is apparent, without going into the figures contained in the Record and other reliable sources, that in each District in each Minium Price Area there are wide variations in costs of production of the several producers, some being high cost producers and others low cost producers. The word "average" connotes this variation. Therefore, any price based on average cost of production of a Minimum Price Area or District works the grossest injustice to both classes of producers.

But matters of this sort are not left to inference from the face of the Act. There is ample evidence in the Record, and in other reliable sources, to support the statements above made:

On pages 408-10 of the House Hearing on H. R. 8479, is found a computation of the weighted average of the production cost for a 10-month period, April, 1934 through January, 1935, for the major mining districts included in Minimum Price Area No. 1. The figures included therein were taken from statistics of the National Recovery Administration. On page 408 it is shown that for such period, the weighted average cost for the entire area was $1.85. However, the following variations appeared *as between the Districts within Minimum Price Area No. 1.*

In District No. 1 (Indiana) the weighted average was $1.52;

In District No. 2 (Illinois), $1.55;

In District No. 3 (Northern West Virginia), $1.67;

In District No. 4 (West Virginia Panhandle), $1.73;

In District No. 5 (Ohio), $1.80;

In District No. 6 (Southern West Virginia, Eastern Kentucky, Southwest Virginia, and part of Tennessee, high volatile), $1.82;

In District No. 7 (Western Pennsylvania), $1.94;

In District No. 8 (Southern West Virginia, smokeless), $1.94;

In District No. 9 (Iowa), $2.11;

In District No. 10 (Central Pennsylvania and Maryland), $2.11;

In District No. 11 (Michigan), $3.18.

Thus, as between the Districts included in Price Area No. 1, there was a variation from $1.52, in Indiana, to $3.18, in Michigan, or a total variation of $1.66—over 100%.

Similar variations are found *within the local districts composing the Districts.* (Ib., 409)

For instance, in No. 1 (Indiana), the low District is shown as $1.33 and the high as $1.72.

In No. 2 (Illinois), the low is $1.37 and the high $1.72.

In No. 3 (Northern West Virginia), the low is $1.63 and the high $2.11.

In No. 5 (Ohio) the low is $1.70 and the high $2.00.

In No. 6 (West Virginia, Kentucky and Tennessee, high volatile), the low is $1.57 and the high $2.05.

In No. 7 (Western Pennsylvania), the low is $1.66 and the high $2.21.

In No. 8 (West Virginia smokeless), the low is $1.87 and the high $2.05.

In No. 10 (Central Pennsylvania and Maryland), the low is $1.92 and the high $2.60

Figures for the different areas in Districts Numbers 4, 9 and 11 are not given in the table.

Similar variations exist *between mines in the same local producing district*, even when they are mining the same seam. This difference flows from the difference in natural conditions in each mine.. (House Hearings p. 427). And, for the most comprehensive study which has been made of production costs, see Cost Reports of the Federal Trade Commission, in six volumes, published in 1919, and Report of Engineers Committee, 1918-19, published by U. S. Fuel Administration in 1919. The charts in the latter re-

port are illuminating, and graphically illustrate the wide variations in costs between *the mines in each local field*. And, on the same subject, see Part IV, Report of United States Coal Commission published in 1925, (wherein costs in every local field in the United States are given and considered statistically).

Consider the case of a low cost producer having an average or superior quality of coal.[1] Assume that the weighted average cost of his Minimum Price Area is $2.00 per ton, but the cost of production of the producer is $1.50. Assume further, that the minimum prices fixed for the producer's various grades and sizes will average $2.00. The producer is willing and able to operate his mine and sell his coal at an average of $1.75 per ton, thereby making a profit of 25c. This ability to produce and sell at a low price, and yet at a profit, is a property right belonging to the producer. Yet by the operation of this Act, the producer in the case supposed would be deprived of the benefit of this property advantage. He must attempt to sell his product at a price which is high enough to create serious danger of driving his customers to competing fuels.

That this is a serious matter is established both by evidence in the Record and in the hearings before

[1] *There is no relation between cost of production and quality of product.* Some high cost mines produce coal of low quality, and some low cost mines produce coal of high quality. There are infinite degrees of variation between cost and quality, no two mines being the same in this respect. (See House Hearings, p. 433.) Realization varies greatly among the different producing districts and, *a fortiori*, among the different mines, no two mines being the same in this respect. See, for example, Def. Exs. 37 (R. 1084), 37A (R. 1085), and 51 (R. 1168). See, also, Bituminous Coal Tables, 1934, Preliminary, published by U. S. Bureau of Mines, which gives the average values in 1934 at the mines for each coal-producing county in the United States. The variations in such values (prices) are very pronounced.

Congressional committees, showing the *enormous* losses of coal to competing laborless fuels and sources of energy in the period since the World War.[1]

Consider, on the other hand, the case of a high cost producer having an average or lower quality coal. The minimum prices will not be sufficient to return his costs. *The minimum prices will in fact be the maximum* (House Hearings, pp. 177-8, Steinbugler). The Act will force him out of business. (House Hearings, p. 164, O'Neill). Thus, the operation of the Act will confiscate the property of certain of the high cost producers. The sponsors of the Act anticipated that this result would occur.

> ". . . that price, I would say, would yield cost or better to about 64 or 65% of the coal production in this area. (Price Area No. 1). . . . The other 35% have to become efficient or lose money." (House Hearings, p. 164, O'Neill).[2]

A fundamental vice in the primary basis of the price fixing provision is that the minimum price at which a single producer is required to sell is based not upon his own conditions and his own costs and quality, but upon the conditions and costs of a vast number of other producers. To regulate "A" upon the basis of "B's" conditions is to deprive "A" of his

[1] See House Hearings, pp. 402, 464-5, 519-22, 527-31, F. F. 54, 55, 75 and 76, Plf. Ex. 26 and 27, R. 820-21, Senate Hearings, pp. 341-2, 364, 442, 445, 448. The most striking illustration is Plf. Ex. 32, R. 825-864, where specific instances of recent substitutions are listed by state, name of consumer, kind of substitute, and tonnages displaced. *The Court's attention is specifically directed to this exhibit.*

[2] To the same effect, see House Hearings, pp. 194 and 196, Steinbugler; p. 212, Mahan; Senate Hearings, p. 528, Mahan. Opponent operators likewise recognized the same necessary effect. House Hearings, p. 435, Francis. And see testimony of O'Neill, witness for the Government defendants, R. 350-51 (35% of mines in his district—Central Pennsylvania —would be forced to operate at loss or without profit).

property and property rights. *Railroad Retirement Board* v. *Alton Railroad Company, et al.*, 295 U. S. 330. In this case, "B" is the average of a host of other producers. A standard of this sort violates every canon of individual rights, and is *per se* arbitrary.

These considerations confirm the statement that the underlying purpose of this basis is, as clearly stated in the Act: "in order to sustain the stabilization of wages, working conditions and maximum hours of labor . . ." (See Sec. 4 II(a))—a purpose openly stated by the sponsors of the Act.[1] Without such purpose there could be no possible explanation for the application of any such basis of fixing prices.

(c) The price provisions ignore the competitive factors affecting the price of coal.

The Record is replete with proof showing the active competition between bituminous coal on the one hand, and anthracite coal, fuel oil, natural gas, hydro-electric power, and even wood, on the other hand. It is also replete with evidence as to the decreased consumption of bituminous coal resulting from this competition. Consumption has likewise been substantially decreased by reason of the improvements which have been made in the utilization of coal. Increase in price encourages efficiencies in utilization. Thus, the ability of a producer to continue in business depends upon his ability to make prices which are competitive with other sources of heat and energy, and which will not encourage his customers to make large capital investments to reduce the quantity of

[1] Senate Hearings, p. 543, 546, Lewis; House Hearings, p. 26 (the United Mine Workers were the original proponents of the Act, *Ibid.*, p. 78, p. 108, p. 190, Warrum).

coal they use. The producer sells his coal to individual consumers, and he must be in a position to meet competition as it arises in individual instances. To subject a producer to a system of rigid price fixing, which ignores even the existence of competition from the sources and of the kinds above mentioned, and ignores the long-continued method of selling coal, is arbitrary and confiscatory in that it deprives him of that freedom of contract necessary for the proper conduct of his business, and its continued existence.

The N. R. A. Coal Code did not go to this extreme. The fair minimum market prices provided by that Code were those "necessary to carry out the purposes of the National Industrial Recovery Act, to pay the minimum rates herein established, and to furnish employment for labor." But that Code further provided:

> "It shall be proper, in determining such fair market price, to take into consideration, in addition to the matters above set out, also competition with other coals, fuels, and forms of energy or heat production." (Plf. Ex. 59, R. 877)

(d) The authority of the District Boards to classify grades and sizes is arbitrary in that no standards for such classification are fixed by the Act, no standards exist in the industry, and any standards which might be adopted will be arbitrary.

The argument under this heading could properly be placed under a different constitutional point, namely, that authority to classify and to fix minimum prices involves an unlawful delegation of legislative authority. But because of the practical effect of classification upon producers and upon the ability of the different producers to continue in business, the consideration of the lack of adequate standards of

classification is pertinent to any discussion of the Fifth Amendment.

It will be noticed that in subsection (a) of Part II, of Section 4, each District Board is given "full authority in establishing such minimum prices, to make such classifications of coal and price variations as to mines and consuming markets *as it may deem necessary and proper.*"

This provision necessarily assumes that it is possible to classify the different grades, qualities and sizes of bituminous coal according to their relative *market* values. Actually, this cannot be done, because there can be no *market* values in the absence of competition, which it is the bottom purpose of the Act to destroy.

No generally accepted method of determining relative values of various grades, qualities, and sizes of coals, apart from sales in the open market, exists in the bituminous industry. True, many different methods of classification have been proposed, but the character of each of them is determined by the particular purpose in view. Such classifications as to value as have been proposed are likewise limited in scope, and are not adaptable to general use in valuing all grades, qualities, and sizes for all purposes.

Coal is an exceedingly complex material. Variations in physical characteristics, in chemical composition, and in adaptability to different uses are almost without limit. Lack of uniformity is the rule. For example, standards of classification applicable to coal from a given mine when it is to be used for one purpose, such as conversion into by-product coke, will not be applicable when it is to be used for another

purpose, such as raising steam. And even where the purpose is the same, such as raising steam, different standards of classification must be applied with respect to different types of burning equipment and different conditions of combustion. The equipment of the various consumers, and the conditions of consumption, are seldom the same for any two consumers using coal for the same general purpose.[1]

There are other intangible elements which affect relative values. Some of them are: the reputation of the producer for fair and honorable dealing (good will); his financial stability; the uniformity of his product as to size and quality; the capacity of his mines; the amount and efficiency of his merchandising effort; the amount and quality of incidental services of a technical or other character rendered; and location of mines with reference to markets and transportation facilities. These elements are not inherent in the product sold but are personal to the producer or arise from the character of his coal deposits and

[1] On the general subject of the variations in coals and in the uses to which they are put, see the following: 5 Ency. Brit., 14 ed., Coal and Coal Mining, pp. 868 *et seq.* ("There is no standard coal . . .", p. 868); Coal Miner's Pocketbook, 11 ed. (1916), p. 370 *et seq.;* Gas-, Coke-, and By-product-making Properties of American Coals and their Determination, U. S. Bureau of Mines, Monograph No. 5, (1934); Coal Washing Investigations—Methods and Tests, U. S. Bureau of Mines, Bulletin 300 (1929); Composition and By-Product Values of Some West Virginia Coals, Research Bulletin No. 9, Enginering Experiment Station, West Virginia University (1933); Sources of Coal and Types of Stokers and Burners Used by Electric Public Utility Power Plants, Brookings Institution Pamphlet Series, Vol. II, No. 2, Dec. 31, 1930 (by Dr. Wm. Harvey Young, of U. S. Bureau of Mines); Clarence V. Beck, Modern Combustion, Coal Economics and Fuel Fallacies (1931); The Problem of "Minimum Fair Competitive Prices" in the Bituminous Coal Industry, Northern West Virginia Subdivisional Code Authority, (1935), p. 29, *et seq.;* the various papers on classification in Vols. 101 and 108, Transactions of American Institute of Mining and Metallurgical Engineers, Coal Division for the years 1932 and 1934; A. I. Shurick, The Coal Industry, (1924), p. 155 *et seq.;* House Hearings, p. 433; Senate Hearings, p. 187; Utilization Investigations, Coal Mining Congress Year Book 1934, p. 201. And see R. 269;

equipment or from the location of the mines. But they enter into the determination of price.

It is literally impossible for any system of classification, applicable to the many coals of many producers, to take into consideration all of the various combinations of factors which occasion differences in value, and to assign to them a proper monetary equivalent. Hence, any classification which might be adopted to reflect relative values will of necessity be arbitrary in character and confiscatory in effect, and must eventually result in allocation of production quotas as the sole guide for determining prices.[1]

An indication of the extent of the task sought to be imposed upon District Boards appears from the statement made before the House Committee that approximately 40,000 different kinds, sizes and qualities of coal are produced in Minmum Price Area No. 1 (House Hearings, p. 411, Francis).

Mr. John L. Lewis correctly summarized the price fixing provisions of the bill (S. 1417) then before the Senate Committee by stating:

> "The marketing feature is naturally more or less arbitrary in its provisions." (Senate Hearings, p. 575).

[1] This is clearly recognized in the Act itself. Sec. 16 imposes on the Commission the duty of investigating the necessity of production control and of allotment of output to districts and producers and of reporting thereon to Congress by January 6, 1936 (about two months after the Code became effective). The first draft of the bill, S. 1417, specifically provided for allocation of tonnage (Senate Hearing, pp. 2-3). And while such provisions were removed during the course of legislative consideration of the bill, it is still recognized by the sponsors of the bill and by those familiar with its intended operation that without allocation of production to districts and to mines the minimum price provisions cannot function successfully (Senate Hearings, Warrum, p. 14; Steinbugler, p. 57; O'Neill, p. 161; Murray, p. 151. See, also, testimony of O'Neill, witness for Government, R. 364).

He supports this conclusion by the following convincing statement concerning the operation and breakdown of the N. R. A. Coal Code:

> "Just in order to give the Committee a slight understanding of the very difficult problem there is in arranging prices for the marketing of the bituminous product, and the great difficulty in enforcing adherence to those marketing provisions in the coal industry with a voluntary form of code of fair practices, I submit for the inspection of the Committee this compilation of minimum fair market prices for bituminous coal, as shown on January 1, 1935, prices listed in all subdivisions of division No. 1, except Western Kentucky . . . This compilation contains for that year 27,000 prices f. o. b. and destination points . . . It is an amazing document *and will give the committee some idea of the inherent difficulties and an understanding as to why prices in the bituminous coal industry under the code plan have broken down.*" (Senate Hearings, p. 576) (Italics ours.)

Mr. Charles S. Hosford, Jr., (now Chairman of the National Bituminous Coal Commission created by the Act), then associated with the Code Authority of Western Pennsylvania, pointed out to the Senate Committee the impossibility of compliance with the price fixing provisions of the same bill.

> "Referring to s. 4, Part II, the marketing provisions of the bill, I confess that I find myself in the same dilemma as on allocation, only worse confused, if that is possible.
>
> "As I read this section, what I believe will result very promptly after this act goes into effect is that the National Coal Commission will

have thrust upon it the enormous task of attempting to establish a price for *every grade* and *class* and *size* of coal in *every market* in the country; *and I do not believe that any commission can be found that can accomplish successfully that task in a practical way.*" (Senate Hearings, p. 128) (Italics ours).

While substantial changes were made by the bill as passed in the price fixing provisions contained in S. 1417, the difficulties referred to by Mr. Lewis and Mr. Hosford of classifying and fixing prices for every grade and size of coal in the competitive markets of the country, are inherent and still remain.

(e) The minimum price system provided in the Act is arbitrary and confiscatory because of its rigidity.

The present practice in most districts is to prepare coal into different sizes at the mines. The number of sizes which can be prepared depends upon the tipple equipment of the individual mine and the character of the demand for the coal produced. In some districts more sizes are prepared than in others (R. 268).

The producer makes all different sizes concurrently. Consequently, if he is to keep his mine in operation he is faced with the necessity of being able to dispose of all the different sizes as they are currently produced. Since most mines have little, if any, storage facilities either at the mines or at points of consumption, the usual result in the industry is that when mine tracks are filled with cars loaded with any particular sizes for which sale cannot be found, the mine must shut down. (R. 268).

Shutting down a coal mine and maintaining it idle are expensive and frequently it is cheaper to operate the mine at a loss than it is to shut it down. (R. 417).

The demand for different sizes of coal varies during the year. In the fall and winter seasons the demand for domestic sizes is accentuated. The degree of such stimulation depends largely upon the severity of the weather. On the other hand, in the spring and summer months the demand for domestic sizes is not acute, and as a general rule the demand is greater for sizes suitable for steam, gas and by-product purposes (R. 339-340). These latter purposes consume generally the smaller sizes of coal. Thus, the ordinary producer must be able to adjust his prices on different sizes to the seasonal demand, charging a higher price for the sizes for which the demand is active and charging a lower price on sizes for which the demand is slack, thus keeping all sizes moving from the mine as produced. Without the ability to make lower prices on domestic sizes in the summer, in order to induce their purchase and storage in advance of consumption, and without the ability to make lower prices on the smaller sizes during the fall and winter months when the demand for domestic sizes is active, the producers would frequently have to shut down their mines when otherwise they would keep them in operation. The ability quickly to adjust prices to the varying demand is the *sine qua non* of successful operation. (For samples of adjustment of prices on different sizes, see Senate Hearings, pp. 386-89).

The price fixing provisions of the Act not only ignore the necessity of maintaining this flexibility in adjustment of prices, but, on the contrary, specifically prohibit such flexibility. In establishing minimum prices under the provisions of Sec. 4, Part II (a) upon the primary basis of weighted average of total cost, the District Boards and the Commission are forbidden to take into consideration variations in production cost due to seasonal demands. Indeed, after the weighted average of total cost has been established, it must be maintained as the primary basis for fixing minimum prices until there is a change of at least two cents per ton in the weighted average of the total cost of the Minimum Price Area. The system does not admit of adjustment of prices to seasonal demand, but establishes a rigid formula maintained regardless of the changes in demand for the different grades and sizes. Even assuming that it were possible for all the various grades and sizes and qualities of coal to be priced on the basis of their relative values (which assumption it has been seen is utterly unfounded), the rigidity of the system will induce a greater degree of fluctuation in operation than ever existed heretofore. The mines of each producer will be able to operate only when he is able to sell, at the prices fixed, *all* of the various grades and sizes as they are produced. And during those periods of the year when they are unable to do this the mines must close down. A system of this sort is utterly destructive of the property rights of the producers. Whatever considerations may lead Congress to an attempt to regulate the prices of coal, it has no right to impose a system which will greatly increase the interruptions of operations, and the cost of production.

> "To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." (Mr. Justice Holmes, in *Pa. Coal Co.* v. *Mahan*, 260 U. S. 293).

The Act provides no remedy for such injury. Nor does it provide an *effective* remedy for one who is harmed to a greater extent than his competitor. Gross discrepancies are bound to occur. (House Hearings, p: 434). True, appeals may be addressed to the District Board, the Commission, the Circuit Court of Appeals, and possibly to this Court. But such procedure consumes time, and if during the period of litigation, a producer's mine is shut down, as it may well be if only one size of one grade is mispriced, the remedy is an illusory one. (See R. 270-271—Caretta mine of Carter Coal Company shut down under N. R. A. through mistake in good faith in pricing its product). Proposed reductions in prices would naturally be opposed by those having a contrary interest, thus prolonging the period for obtaining relief.

A system of minimum prices in this industry is simply another name for production control. The price of a particular grade or size of coal and the relationship thereof to the prices of competing fuels and sources of energy, as well as to the price of other coals, and the varying demands, are the main factors which will determine the amount thereof which can be produced and sold and by whom. Therefore, authority to a District Board or to a Commission to fix minimum prices is likewise authority to say how much each producer may produce and sell. Clearly, the Commerce Clause gives Congress no control over production,

and any device parading under the cloak of an exercise of that power which has the purpose and necessary effect of controlling production and of allocating production among the various states and among the various mines therein, is void for reasons other than violation of the Fifth Amendment.[1] But even if the commerce power permitted allocation and control of production, a system so rigid and so unrelated to commercial realities is utterly arbitrary, capricious and confiscatory.

(f) The attempted invalidation by Section 12 of certain contracts in effect at the time the Act was approved, is arbitrary and unreasonable because of the classification of contracts invalidated.

It is not intended to discuss under this heading the power of Congress to invalidate existing contracts.

Section 12 deals with the performance of contracts (after minimum prices are established as provided in Part II of Section 4) which were made prior to August 30, 1935, the date of approval of the Act. It is to be noted particularly that all contracts made prior to August 30, 1935, are not invalidated. Instead, those contracts are invalidated which were made at prices lower than the minimum to be established under the provisions of the Code set forth in the Act. However, Section 12 excepts from invalidation three classes of contracts. They are: First, those made prior to October 2, 1933; second, those made after October 2, 1933 and before May 27, 1935, at not less than the prices established under the N. R. A. Code and in effect at the time of making the contracts; and, third, contracts made on or after May 27,

[1] The question of the power of Congress to allocate production and the arbitrary character of the allocation features of this Act are fully covered in the brief of Petitioner.

1935 and prior to August 30, 1935, at not less than the prices established and in effect under the N. R. A. Code as of May 27, 1935.

The N. R. A. Coal Code was adopted and became effective on October 2, 1933 (R. 877). It was declared invalid in the *Schechter* case, May 27, 1935. Section 12 makes no effort to invalidate contracts made prior to the time the N. R. A. Code was effective. It does attempt to invalidate contracts made at less than N. R. A. Code prices during the time the Code was in effect and those made *after the N. R. A. was declared unconstitutional, if at prices less than those in effect at such time.* To this extent Section 12 attempts to resuscitate and breathe life into the unconstitutional N. R. A. Coal Code, not only during the time it purported to be in effect but even after it expired under its own terms.

Regardless of any power which Congress may have to invalidate contracts, any such distinction made between those invalidated and those not invalidated, not being related to any purpose which the Act may have (as shown by the fact that contracts made prior to October 2, 1933, are not invalidated, regardless of the prices provided therein), is without basis of reason and is arbitrary.

C. THE PENALTIES IMPOSED BY THE ACT UPON PRODUCERS WHO DO NOT ACCEPT THE CODE AND SURRENDER ASSERTED CONSTITUTIONAL RIGHTS ARE SO DRASTIC, SEVERE AND EXCESSIVE AS TO DENY THEM DUE PROCESS OF LAW.

Section 3 of the Act imposes a penalty in the form of a tax of fifteen per cent on the sale price or market value "of all bituminous coal produced within the United States," with a drawback or credit of 90% thereof to producers who *accept and comply with* the

Code. The section was deliberately drafted for the purpose of forcing all producers to accept and obey the Code.

Senator Neely, who had charge of the bill on the floor of the Senate, said in opposition to a proposed amendment to eliminate the tax provision: "Mr. President, if this amendment should be adopted, the purpose of the bill would be entirely defeated." (Congressional Record, Vol. 79, 74th Congress, First Session, p. 14411); and Mr. Henry Warrum, General Counsel of the United Mine Workers of America, stated that he was the first draftsman of the bill [1] (House Hearings, p. 28) and that the taxing clause was inserted as a "coercion to join the Code," (House Hearings, p. 58) after which followed this colloquy:

> "Mr. Treadway: Can you give us any estimate, Judge, of the financial difference that will make to any of the big producers, whether they join your Code and get your credit or drawback, or do otherwise?
>
> "Mr. Warrum: No; I cannot. But I assume that a tax of this kind, considering it as a drawback, is a sufficient consideration to lead the biggest and the best producers to retire to their closets with their attorneys for prayerful meditation as to whether or not they can afford to pay the tax and run amuck. I think if it is not big enough, it ought to be big enough.
>
> "Mr. Treadway: You approach compulsion as nearly as you can without using specific language.
>
> "Mr. Warrum: That is right." (House Hearings, p. 120).

[1] The bill as introduced provided a tax of 25% with a drawback of 99% thereof to Code members.

The evidence in this case demonstrated the effectiveness of the coercion proposed by this section. The trial court found that bituminous coal producing companies, generally, had not earned a net profit of 13½% of their mine realization price at any time during the last eight or nine years, and that in the view of those familiar with the industry, the so-called tax provisions of Section 3 will have the effect of inducing (or coercing) those bituminous coal producing companies who are opposed to the Code to accept and comply with the Code. (F. F. 41).

The bills of complaint of each of the Non-Code Producers filing this brief contain facts and figures showing the confiscatory nature of this penalty, as applying to those plaintiffs, and their inability to continue operation through the period necessary to test the constitutionality of the Act, unless protected by an injunction restraining the collection of this penalty, *pendente lite.*

Injunctions were granted by the several District Courts in which such suits were brought upon the holding that the suits had been seasonably instituted in good faith for the purpose of testing the constitutionality of the Act, that reasonable ground existed for testing its constitutionality, and that under the doctrine announced by this Court in *Ex Parte Young,* 209 U. S. 123, 127, and the line of cases which have followed and applied the principle there announced, these Non-Code Producers are entitled to protection from this penalty during such litigation even if it should finally be decided that the Act be valid. *Wadleigh Southern Ry. Co.* vs. *Georgia,* 235 U. S. 651, 666; *Oklahoma Operating Co.* v. *Love,*

252 U. S. 331; *Stafford* v. *Wallace*, 258 U. S. 495; *Board of Trade* v. *Olsen*, 262 U. S. 1.[1]

The penalty imposed by Section 3 is by no means the only coercion which the Act exerts for the purpose of compelling producers of bituminous coal to submit to regulation of their business by accepting the Code. Section 14 imposes a boycott on the part of the United States and all departments and agencies thereof against producers who do not accept and comply with the Code.

The provisions of this boycott have been made effective by action taken by the Federal authorities controlling the purchase of supplies by the United States and contracts for public work or service, including opinions by the Comptroller General of the United States rendered from time to time to heads of departments to the effect that the provisions of both subsections (a) and (b) of Section 14 must be strictly complied with. (See opinion of Comptroller General rendered January 2, 1936 to the Postmaster General, concerning the leasing of Post Office quarters, and contracts for supplying electric, gas, water or steam service for government buildings.) No argument is necessary to emphasize the coercive nature of the drastic provisions of this section.

Still further coercion is provided by Section 13 of the Act. This section denies to producers, creating marketing agencies such as were approved by this Court in *Appalachian Coals* v. *United States*, 288

[1]For instances of the application of the rule of *Ex Parte* Young by lower Federal courts, see *Oklahoma City* v. *Dolese*, 48 F. (2d) 734 (C.C.A.-10); *Henderson* v. *Rr. Com. of Texas*, 56 F. (2d) 218; *Merc. Trust Co.* v. *Texas & R. Ry. Co.*, 216 Fed. 225; *Kern Trading & Oil Co.* v. *Associated Pipe Line Co.*, 217 Fed. 273; *Van Dyke* v. *Geary*, 218 Fed. 111; *Royal Farms Dairy* v. *Wallace*, 7 F. Sup. 560; *City of Marysville* v. *Standard Oil Co.*, 27 F. (2d) 473 (C.C.A.-8).

U. S. 344, the right to avail themselves of such marketing agencies unless such agencies be approved by the Commission. By its General Order No. 4, made October 23, 1935, the Commission provided for the provisional approval of marketing agencies. In order to secure such approval the Commission decreed that the agency and its producer members must accept the jurisdiction of the Commission and of the District Board of the district in which the agency operates (Section (f)); and that all coal classifications and price determinations made by the agency should be in conformity with the provisions of the Act, and with all rules, regulations and orders of the Commission and of the District Boards of the districts in which the agency operates (Section (h)).

Section 12, in terms, attempts to invalidate and make unenforceable certain contracts made by non-Code producers prior to the effective date of the Act, as hereinbefore noted. The bills of complaint filed by these Non-Code Producers show the existence of contracts coming within the destructive terms of this provision. The Record in this case discloses that contracts of the defendant, Carter Coal Company, embracing a large tonnage of coal at an aggregate price of over one million dollars, fall within the effect of this section (F. F. 39).

Section 10 authorizes the Commission to require producers to maintain a uniform system of accounting to be prescribed by the Commission. Subsection (c) imposes a forfeiture of $50.00 a day for each day of continuance of the failure of any producer after demand to report to District Boards its orders, contracts, invoices, credit memoranda and other information concerning the quantity, preparation, cost,

sale and distribution of his coal under the provisions of Section 4, Part II, subsection (a). Demand has been made by the Commission upon all Non-Code Producers for the furnishing of this information, as heretofore pointed out.

The imposition of drastic penalties as a device to compel compliance with legislative mandate of doubtful constitutionality has been repeatedly attempted, and as consistently condemned by this Court. The proponents of this Act wrote into it the penal provisions noted above for the double purpose of coercing acceptance of the Code by all bituminous producers and of denying them the right to test the validity of the Code and Act in advance of such acceptance. This Court has held that this latter objective may not be accomplished consistently with due process.

CONCLUSION

It is respectfully submitted that, for the reasons hereinabove shown, as well as for the many reasons so ably discussed in brief of Petitioner, the Bituminous Conservation Act of 1935 is unconstitutional in its entirety.

Respectfully Submitted,

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APPENDIX A

Name	Mines Located In State	Code Dist. No.	1934 Production	District Court Where Suit Is Pending
Apex Coal Company, The	Kans.	15	98,065	Kans.
Anchor Coal Company	W. Va.	8	302,175	Sou. W. Va.
Berwind-White Coal Mining Co., The	Pa.	1	2,584,131	East. Pa.
Black Band Corporation	W. Va.	8	173,126	Sou. W. Va.
Blockton-Cahaba Coal Company	Ala.	13	207,437 [4]	Nor. Ala.
Blue Valley Coal Corporation	Ky.	9	71,247 [5]	West. Ky.
Boone County Coal Corporation	W. Va.	8	593,800	Sou. W. Va.
Brookside-Pratt Mining Company	Ala.	13	310,395	Nor. Ala.
Cabin Creek Consolidated Coal Company	W. Va.	8	1,160,429 [3]	Sou. W. Va.
Chariton River Coal Company *	Mo.	15	21,970	East. Mo.
Consolidation Coal Company [1]	W. Va., Ky., Md., Pa.	1,3,8	8,370,570	Sou. N. Y.
Corrigan, Emmet, d.b.a. Kansas City Midland Coal & Mining Co.*	Mo.	15	59,258	East. Mo.
Cumberland Mountain Coal Co., Inc.*	Tenn.	13	50,000 [2]	Middle Tenn.
Davidson Mining Company	Tenn.	8	60,916	Middle Tenn.
Delta Coal Mining Company	Ill.	10	360,780 [2]	East. Ill.
Diamond Coal Company	Ky.	9	277,856 [5]	West. Ky.
Dixport Coal Company	W. Va.	8	77,656	Sou. W. Va.
Dry Branch Coal Company	W. Va.	8	62,695	Sou. W. Va.
Eagle-Cherokee Coal Mng. Co., The *	Kans.	15	109,440	Kans.
Elk River Coal & Lumber Company	W. Va.	8	663,052	Sou. W. Va.
Fentress Coal & Coke Company	Tenn.	9	200,000 [4]	Middle Tenn.
Hanna Coal Company of Ohio	Ohio	4	1,596,490	Nor. Ohio
Hart Coal Corporation	Ky.	9	249,039 [5]	West. Ky.
Harmon Creek Coal Company	Ky.	9	97,642 [5]	West. Ky.
Hume-Sinclair Coal Mining Company *	Mo.	15	561,270	West. Mo.
Huntsville-Sinclair Mining Company *	Mo.	15	321,323	West. Mo.
Island Creek Coal Company	W. Va.	8	3,475,325	Sou. W.Va.
Jackson-Laxton Coal Company	Tenn.	9	59,000	Middle Tenn.
Jefferson Coal Company, The	Ohio	4	1,080,091	Nor. Ohio
Kentucky Derby Coal Company	Ky.	9	31,746 [5]	West. Ky.
Kington Coal and Coke Company	Ky.	9	110,914 [5]	West. Ky.
Leevale Collieries, Inc.	W. Va.	8	59,198	Sou. W. Va.
Little Cahaba Coal Company	Ala.	13	See Note 7	Nor. Ala.
Lick Creek Coal Company	Ky.	9	53,134 [5]	West. Ky.
Low Vein Coal Company	Ky.	9	22,727 [5]	West. Ky.
Mallory Coal Company	W. Va.	8	667,871	Sou. W. Va.
Minden Coal Company	Mo.	15	224,310	West. Mo.

Name	Mines Located In State	Code Dist. No.	1934 Production	District Court Where Suit Is Pending
Meador, Young and Holt Company	Ky.	9	66,052 [8]	West. Ky.
Newcastle Coal Company	Ala.	13	191,000	Nor. Ala.
New Coal Corporation	Ky.	9	24,532 [8]	West. Ky.
New River & Pocahontas Consolidated	W. Va.	7	2,711,654	East. Pa.
Ocean Coal Company *	Pa.	2	321,523	East. Pa.
Phelps Dodge Corporation [3]	N.Mex.	17	258,497	Sou. N. Y.
Pike-Floyd Coal Company *	Ky.	8	355,104	West. Ky.
Pioneer Coal Company, The	Kans.	15	137,971	Kans.
Pittsburg & Midway Coal Mining Co.	Kans., Okla., Mo.	15	494,830	Kans.
Pittsburgh Coal Company	Pa.	2	10,103,203	West. Pa.
Pocahontas Corporation, The	Va., W. Va.	7	1,658,171	Western Va.
Pocahontas Fuel Company, Inc.	Va., W. Va.	7	2,894,774	Western Va.
Pond Creek Pocahontas Company	W. Va.	7	1,563,084	Sou. W. Va.
Pulaski Iron Company	W. Va.	7	112,618	Western Va.
Reinecke Coal Mining Company	Ky.	9	85,059 [8]	West. Ky.
Reitz Coal Company	Pa.	1	568,884	West. Pa.
Riverside Coal Company *	Mo.	15	22,014	East. Mo.
Ruckman Coal Company	Ky.	9	231,200 [8]	West. Ky.
Southland Coal Company	Ky.	9	42,108 [8]	West. Ky.
Stearns Coal & Lumber Company	Ky.	8	548,951	East. Ky.
Stith Coal Company	Ala.	13	112,394	Nor. Ala.
Sudduth Fuel Company [5]	Ky.	8	97,315	West. Ky.
Tebo Coal Company *	Mo.	15	73,157	West. Mo.
Truax-Traer Lignite Coal Company	N. D.	21	582,560 [8]	Nor. N. D.
Union Collieries Company	Pa.	2	1,116,490	West. Pa.
Virginia Jellico Coal Company	Tenn.	8	116,950	Middle Tenn.
West Kentucky Coal Company [5]	Ky.	9	1,752,537	West. Ky.
Williams Coal Company	Ky.	9	318,480 [8]	West. Ky.
Windsor Coal Company *	Mo.	15	148,374	West. Mo.
Total			51,134,564	

* *Sells wholly intrastate.*

[3] Temporary restraining order only; action on motion for temporary injunction awaiting decision of the Supreme Court in No. 663 and related cases.

[4] Figures are for 1935.

[5] Approximately.

[6] Bill dismissed; appeal pending with stay order; 1½% impounded in Court.

[7] Includes tonnage of Little-Cahaba Coal Company.

[8] Tonnage included with Blocton-Cahaba Coal Company.

[9] Fiscal year ending 3/31/35.

[10] Average annual production.